

IN THE MATTER OF THE ARBITRATION BETWEEN

)	
)	
INDEPENDENT SCHOOL DISTRICT NO.)	BMS NO. 05-PA-269
2154 EVELETH/GILBERT)	
)	
“EMPLOYER”)	
)	DECISION AND AWARD
And)	
)	
EDUCATION MINNESOTA)	RICHARD R. ANDERSON
EVELETH-GILBERT)	ARBITRATOR
)	
“UNION”)	MARCH 28, 2006
)	
)	

APPEARANCES

For the Employer:

John M. Colosimo, Attorney
Adam J. Licari, Attorney
Michael Lang, Superintendent of Schools
Deborah Hilde, High School Principal

For the Union:

William F. Garber, Attorney
James Poole, Education Minnesota Field Staff Representative
Valerie Wier, Elementary School Teacher/ Local 1991 President
Steve Clouse, Junior High School Teacher
Daniel Kriska, Senior High School Teacher
Phillip Bober, Senior High School Teacher

JURISDICTION

The hearing in above matter was conducted before Arbitrator Richard R. Anderson on February 24, 2006 in Eveleth, Minnesota. Both parties were afforded a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on February 24, 2006. Post-Hearing Briefs were mailed by the Employer, hereinafter the School District, on March 15, 2006 and received on March 17, 2006; and by the Union on March 17, 2006 and received on March 18, 2006.¹ This matter was then taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement that was effective from July 1, 2003 through June 30, 2005². The language in Article XI [GRIEVANCE AND ARBITRATION PROCEDURE] provides for the filing, processing and arbitration of a grievance. Section 7 Subsection 3 of this Article defines the jurisdiction of the arbitrator and establishes that the arbitrator is the sole decision maker in this matter.

BACKGROUND

The School District is an independent public school district located in the City of Eveleth, Minnesota. The Union, through Local 1991, represents all of the School District's teachers. The bargaining unit is set forth in Article II [EXCLUSIVE

¹ The Simultaneous mailing date was March 17, 2006.

² Joint Exhibit No. 1

REPRESENTATIVE]. The parties have a history of collective bargaining dating back to the early 1970's.³

On August 18, 2004 Union Staff Representative James Poole sent Superintendent Michael Lang a letter dated Wednesday August 18, 2004 wherein he informed Lang that he had just learned that the School District was going to go to an eight (8) period day for the coming school year.⁴ Lang then responded to Poole by letter dated August 24, 2004.⁵ The Union did not agree with Lang's response and on September 1, 2004 the Union, through Associate Grievance Representative Steve Clouse, filed a written grievance pursuant to Step Two of the grievance procedure. The grievance alleged that the School District violated Article VIII Section 2, Subsection 2 [WORKING CONDITIONS] of the Agreement by increasing the normal teacher workload from the contractually mandated five (5) classes per day to six (6) classes per day.⁶ Thereafter, the School District returned the unsigned grievance form back to Clouse.⁷ On or about September 13, 2004, the Union moved the grievance to Step Three after the School District did not reply to the grievance. Thereafter, Lang responded by memorandum to Clouse dated September 20, 2004 that it did not recognize the grievance and advised him to seek counsel from the parent Union to compel arbitration.⁸ The Union then filed for arbitration with the State of Minnesota Bureau of Mediation Services (BMS) on

³ The Union has represented the current bargaining unit since 1993. At that time the American Federation of Teachers and the National Education Association merged. During this time period the Gilbert teachers' unit and the Eveleth teachers' unit merged into the present unit.

⁴ Union Exhibit No. 3

⁵ Union Exhibit No. 1

⁶ Union Exhibit No. 5. Prior to filing the written grievance the parties were unable to resolve the grievance issue at Step One. Union Exhibit Nos. 1 and 3

⁷ Exact date unknown, but prior to September 13, 2004.

⁸ Union Exhibit No. 2

September 22, 2004.⁹ In its request to BMS the Union described the "Nature of Dispute" as, "*The school district has required the Gilbert Jr high teachers to teach 6 classes full time. The collective bargaining Contract States that teachers are only required to teach 5 classes*". After filing for arbitration, the Union filed a Motion in District Court to compel the School District to arbitrate the grievance.¹⁰ The Court entered its Judgment on November 8, 2005 granting the Union's motion to compel the School District to arbitrate the grievance.¹¹ The undersigned was notified of being selected as the neutral arbitrator by letter from the Union's Counsel dated January 20, 2006.

THE ISSUE

The School District raises both procedural and substantive arbitrability issues.¹² The School District, contrary to the Union, alleges that there is a procedural arbitrability issue as to "Whether the Union forfeited or waived its right to grieve this issue by failing to grieve the issue in a timely manner, as set forth by the parties' Collective Bargaining Agreement". The School District, contrary to the Union, also alleges that there is a substantive procedural issue, which is tied to the procedural arbitrability issue of, "Whether by the Terms of the CBA, the parties agreed only to grieve issues that are filed in a timely fashion". Therefore, the School District, contrary to the Union, is alleging that pursuant to Article XI Section 7 Subsection 3 [GRIEVANCE AND ARBITRATION], this Arbitrator does not have jurisdiction in this matter.

⁹ Union Exhibit No. 6

¹⁰ Exact date unknown.

¹¹ Joint Exhibit No. 2

¹² The issues were not stipulated.

If the undersigned Arbitrator asserts jurisdiction, the substantive issue on the merits according to the School District is, "*Whether the School District scheduling of secondary teachers to either a six out of eight period schedule, or to a three out of four period schedule (ninety minute block schedule) constitutes a violation of the CBA, which provides that a secondary teacher is obligated to teach up to 275 minutes per day*". The Union framed the issue as, "*Whether the School District violated the terms of Article VIII Section 2 Subsection 2 when it added a sixth class to the schedule of all junior high teachers*".

RELEVANT CONTRACT PROVISIONS

ARTICLE II. EXCLUSIVE REPRESENTATIVE

Section 1: RECOGNITION: *In accordance with P.E.L.R.A., the School Board recognizes the Union as the exclusive representative of teachers employed by the School District, which exclusive representative shall have those rights as prescribed by the P.E.L.R.A. and as described in the provisions of this Agreement.*

Section 2: APPROPRIATE UNIT: *The Exclusive Representative shall represent all the teachers in the district as defined in said Act and in this Master Agreement*

ARTICLE 1V. SCHOOL BOARD RIGHTS AND OBLIGATIONS

Section 1. INHERENT MANAGERIAL RIGHTS: *The exclusive representative recognizes that the school district is not required to meet and negotiate on matters of inherent managerial policy, which includes, but is not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organization structure and selection and direction and number of personnel.*

Section 2. MANAGERIAL RESPONSIBILITIES: *The Exclusive Representative recognizes the right and obligation of the School Board to efficiently manage and conduct the operation of the school district within its legal limitations and with its primary obligation to provide educational opportunities for the students of the School District.*

Section 3. EFFECTS OF LAWS, RULES AND REGULATIONS: *The Exclusive Representative recognizes that all employees covered by this Agreement shall*

perform the teaching services prescribed by the School Board and shall be governed by the laws of the State of Minnesota, and by School Board rules, regulations, directives and orders, issued by the properly designated officials of the school district. The exclusive representative also recognizes the right, obligations and duty of the School Board to promulgate rules, regulations, directives and orders from time to time as deemed necessary by the School Board insofar as such rules, regulations, directives and orders are not inconsistent with the terms of this Agreement. The Exclusive Representative also recognizes that the School Board, all employees covered by this Agreement, and all provisions of this Agreement are subject to the laws of the State of Minnesota, federal laws, rules and regulations of the Commissioner of Children, Families & Learning and valid rules, regulations and orders of State and Federal governmental agencies. Any provision of this Agreement found to be in violation of any such laws, rules, and regulations, directives or orders shall be null and void and without force and effect.

Section 4. RESERVATION OF MANAGERIAL RIGHTS: *The foregoing enumeration of district rights and duties shall not be deemed to exclude other inherent management rights and management functions not expressly reserved herein, and all management rights and management functions not expressly delegated in this Agreement are reserved to the school district.*

ARTICLE XVIII. WORKING CONDITIONS

Section 2. LENGTH OF TEACHER WORK DAY:

Subd. 1: Work Day Length: *The teacher work day shall normally be seven and three-fourths (7 3/4) hours, Monday through Friday. On Fridays or on days preceding holidays or vacations, the teacher's day shall end when the school buses depart from the respective Eveleth or Gilbert campus. Included in the work day length shall be a 30-minute duty-free lunch.*

Subd. 2: Secondary Teacher Contact Time: *The normal teacher load will be five (5) classes per day plus professional services excluding study hall, and I.S.S. not to exceed an average of 275 minutes per day. Beginning June 30, 1999, the secondary pupil-teaching contact time shall normally be an average of 275 minutes per day.*

Subd. 4: Preparation Time: *Preparation time for a full-time secondary regular classroom teacher shall be an average of one and one-half (1 1/2) periods per day during the student day. Said average is 75 minutes. Beginning June 30, 1999, the preparation time for a full-time secondary teacher shall be an average of 75 minutes minimum per day. Preparation time for a full-time elementary teacher shall be an average of 60 minutes per day. The Principal and teacher must mutually agree on the prep period length if the prep period is outside of the student day.*

Subd. 5: Non-teaching Duties: *Non-teaching duties shall be distributed on a fair and equitable basis.*

Subd.6: Extra Teaching Assignment: *A secondary teacher who is offered and is willing to accept an extra teaching assignment shall be compensated at 1/6 the teacher's regular salary. An extra teaching assignment means a period-long classroom assignment which is not a professional services assignment under Subd. 2. An elementary teacher who is offered and willing to accept an extra teaching assignment shall be compensated pro-rata on the average of 305 minutes contact time. The teacher shall not be obligated to accept an extra teaching assignment and the School District shall not be obligated to offer an extra teaching assignment to any teacher.*

ARTICLE XI. GRIEVANCE AND ARBITRATION PROCEDURE (BMS Grievance Procedure)

Subd. 5: Grievance: *"Grievance" means a dispute or disagreement regarding the application or interpretation of any term of a contract required under Minnesota Statutes, Section 179A.20, Subdivision I. If no contract exists between the exclusive representative and the employer, "grievance" means a dispute or disagreement regarding the existence of just cause in the discipline of any employee or the termination of non-probationary employees*

SECTION 3. COMPUTATION OF TIME: *In computing any period of time prescribed or allowed by this Article, the day or act or event upon which a period of time begins to run shall not be included. The last day of the time period shall be included unless it is a Saturday, Sunday, or holiday.*

SECTION 4 STEP ONE: *When an employee or group of employees represented by an exclusive representative has a grievance, the employee or an agent of the exclusive representative shall attempt to resolve the matter with the employee's immediate supervisor within 21 days after the employee, through the use of reasonable diligence, should have had knowledge of the event or act giving rise to the grievance. The supervisor shall then attempt to resolve the matter and shall respond in writing to the grievant and the agent of the exclusive representative within five days after the grievance is presented.*

SECTION 5. STEP TWO: *If the supervisor has not been able to resolve the grievance or has not responded in writing within the time period provided in step one, a written grievance may be served on the next appropriate level of supervision by the Exclusive Representative. The written grievance shall provide a concise statement outlining the nature of the grievance, the provisions of the contract or the just cause situation in dispute, and a statement of the relief or remedy requested. The written grievance must be served on the employer's representative within fifteen (15) days after the immediate supervisor's response was due under step one. The employer's representative shall meet with the agent of the exclusive representative within five*

(5) days after service of the written grievance and both parties shall attempt to resolve the grievance. The employer's representative shall serve a written response to the grievance on the agent of the exclusive representative within five (5) days of the meeting. The response shall contain a concise statement of the employer's position on the grievance and the remedy or relief the employer is willing to provide, if any.

SECTION 6. STEP THREE: *If the grievance is not resolved under step two, the exclusive representative may serve the written grievance upon the chief administrative agent of the employer or the person's designated representative within ten (10) days after the written response required by step two was due. An agent of the exclusive representative shall meet with the chief administrative officer or designee within five (5) days of service of the written grievance and they shall attempt to resolve the matter. The Chief Administrative Officer or designee shall serve a written response to the grievance on the agent of the exclusive representative within five (5) days of the meeting.*

SECTION 7. ARBITRATION:

Subd. 1: Referral to Arbitration: *If the response of the Chief Administrative Officer or designee is not received within the period provided in Step 3 or is not satisfactory, the Exclusive Representative may serve written notice on the employer of its intent to refer the case to arbitration within ten (10) days after the response required by Step three is due.*

Subd. 3: Arbitrator's Authority: *The arbitrator shall have no authority to amend, modify, add to, or subtract from the terms of an existing contract. The decision and award of the arbitrator shall be final and binding upon both parties.*

SECTION 8: PROCESSING OF GRIEVANCES:

Subd. 3: Time Limits: *Failure to raise a grievance within the time limits specified in Section 4, or to initiate action at the next step of the procedure in Sections 4, 5, 6 and 7 within the time limits in these parts shall result in forfeiture by the exclusive representative of the right to pursue the grievance. A failure of an employer representative to comply with the time periods and procedures in Sections 4, 5, 6 and 7 shall require mandatory alleviation of the grievance.*

ARTICLE XVI. DURATION AND EFFECT

SECTION 2. EFFECT: *This Agreement constitutes the full and complete Agreement between the School Board and Education Minnesota Eveleth-Gilbert representing the teachers of the District. The provisions herein relating to terms and conditions of employment supersede any and all prior agreements, resolutions, practices, school*

district policies, rules, or regulations concerning terms and conditions of employment inconsistent with these provisions.

FACTS

In July 1993, the Eveleth and Gilbert school districts were officially consolidated into the present School District.¹³ Michael Lang, who had been simultaneously the superintendent at both school districts, became the School District's superintendent and remains in that position to date. Prior to the consolidation, the two school districts were separate bargaining units with separate agreements. After the consolidation, there was a single agreement covering a bargaining unit of both elementary and secondary teachers. The secondary high school teachers taught at the high school located in Eveleth while the secondary junior high teachers taught at the junior high school located in Gilbert. Elementary teachers taught at elementary schools in both communities.¹⁴

In the first consolidated contract covering the 1993-1995 school years, the language in Article VII Section 2 [LENGTH OF TEACHER WORK DAY]¹⁵ established a teachers' workday of seven and three-fourths (7¾) hours, Monday through Friday, which included a 30-minute duty-free lunch period.¹⁶ This language remained unchanged in subsequent Agreements. The language in Subsection 2 [SECONDARY TEACHER CONTACT TIME] of this Agreement described the teacher student contact time as *"The normal teacher load will be five (5) classes per day plus professional*

¹³ The school districts in fact de facto consolidated in 1986.

¹⁴ The elementary teachers are not directly involved in the issues before the undersigned. Henceforth, I will be referring to the secondary teachers when I use the term teacher(s).

¹⁵ Hereinafter any reference to a Section or Subsection will reference Article VIII unless otherwise noted.

¹⁶ School District Exhibit No. 3 regarding the 1993-1995 Agreement.

services excluding study hall and I.S.S¹⁷, not to exceed an average of 275 minutes per day".¹⁸

In late 1995, the parties entered into a Letter of Understanding redefining the teacher workday in Subsection 2 as follows, "*The normal teacher load will be five (5) classes per day plus additional teaching assignments not to exceed 275 minutes.*"¹⁹ The Letter of Understanding also included a provision that "*The professional services²⁰ will continue to average 25 minutes per day*"; and it also contained a provision that allowed the School District to negotiate an alternative to the "professional services assignment".

Lang testified that there were several negotiations with the Union for the 1997-1999 agreement that resulted in the parties agreeing to the School District having six-class teaching periods out of eight periods a day.²¹ According to Lang, the parties reached a Tentative Agreement on January 13, 1998.²² Lang also testified that the Tentative Agreement covered the parties' agreement on various items including a new schedule format for the secondary teachers' workday. According to Lang, there was no distinction made between junior high and high school teachers in this Tentative Agreement; however, there was a distinction made

¹⁷ In School Suspension.

¹⁸ School District Exhibit No. 3 regarding the 1995-1997 Agreement.

¹⁹ The Letter of Understanding is a part of School District Exhibit No. 3.

²⁰ Professional services are assignments that improved or expanded curriculum, or improved community relations or increased student/teacher contact in tutorial or advisory relations. It did not include study hall or I.S.S.

²¹ Lang's negotiation notes. School District Exhibit No. 4

²² School District Exhibit No. 5

between secondary and elementary teachers. Lang further testified that the School District also wanted to move away from the teachers ATA (additional teacher assignment).²³ The language in this agreement is as follows:

5. Maintain the secondary teacher student contact time at 275 min/day.

1) Sunset reference to ATA and "period" throughout the contract effective 6-30-99.

*2) Transition ATA activities for 1997-98 & 1998-99 (list not conclusive):
Advisor/advisee, chess club, E-G Live, elementary French/Spanish mini classes, supervising computer labs, available in media centers, Geography Bee, Close Up advisor, Jr. high locker supervision, math counts, Student of the Week advisor, interdisciplinary curriculum writing/planning, new course development followed by implementation, committee head, mentoring/peer evaluation, structured after school area(s) for Jr. high (bus) students.*

3) Secondary teachers agree to teach a maximum of (3 out of 4 periods in a block schedule, 6 out of 8 in an 8 period day) 275 min. of student contact (teaching time) in all types of schedules except a 7 period day. In a 5 out of 7 period day they will staff student activities as indicated in (2) above. Student contact is defined as classes (math, science, social, etc.) and not those contacts with students as listed in the ATA assignments.

Testimony of Lang and the document disclose that teachers Rich Moore, Ron Cerar and Dave Johnson were the Union representatives involved in contract negotiations that culminated in this Tentative Agreement. Lang further testified that the Tentative Agreement was the subject of a School Board meeting during which time it was approved. Prior to a Board meeting, a packet of materials relevant to or on the Board's agenda is circulated to all Union officials including building representatives.²⁴ During their testimony, Union witnesses Bober, Kriska, Clouse

²³ Also referred to as professional services.

²⁴ Kriska, Clouse and Wier testified they were not Union officials and Bober could not recall if he was one during this time period

and Wier agreed that School Board agenda packets are distributed to Union officials prior to a Board meeting; however, they had either never seen the Tentative Agreement document or had not seen it until approximately six months prior to the hearing. The four Union witnesses also testified that neither the Tentative Agreement nor its provisions involving a new schedule format was ever circulated during Union ratification meetings for the 1997-1999 Agreement.

Lang also testified that there was a quid pro quo associated with the Union agreeing to the new schedule format. The School District agreed to raises for teachers that averaged 8.2% for the term of the agreement.²⁵ In addition, the School District increased the early retirement bonus and other fringe benefits.²⁶

The understanding of the parties in the Tentative Agreement was not specifically addressed in Subsection 2 of the 1997-1999 Agreement. Rather, the language stated, "*The normal teacher load will be five (5) classes per day plus professional services excluding study hall, and I.S.S. not to exceed an average of 275 minutes per day.*" However, a second sentence was added. According to Superintendent Lang, the second sentence was added to reflect the previous agreement of the parties which allowed the School District to go to the new schedule format without violating the Agreement. The second sentence language stated, "*Beginning June 30, 1999, the secondary pupil-teaching contact time shall normally be an average of 275 minutes per day.*" This Subsection 2 language remained unchanged through the 2003-2005 Agreement.

²⁵ School District Exhibit No. 6 pgs. 1-2

²⁶ School District Exhibit No. 6 p. 1

For the 1999-2000 school year, the School District implemented a student eight period day at both the junior high and high schools. The teachers at the high school had their teaching assignments changed to either 45-minute classes for six out of eight periods or 90-minute classes for three out of four periods a day.²⁷ When the sixth teaching assignment was added at the high school, the professional services or additional teaching assignment (ATA) and the study hall were eliminated. Although the Agreement contained a provision for a 275-minute normal teaching day, the high school teachers' student contact time was 270 minutes under this schedule. The previous student contact time had also been 270 minutes at the high school consisting of five (5) classes of 49 minutes and professional services class and/or student contact time of 25 minutes.

Before the parties agreed to the new schedule format,²⁸ the School District sought input from teachers and administrators from both the junior high and high schools. Teachers and administrators attended workshops or went to various other school districts where this same schedule format had been implemented to see how the process involving a block schedule and/or a schedule consisting of the six-class periods of student contact time out of an eight period day worked, and to find out what impact this schedule format had on the teachers.²⁹

²⁷ The later is known as "block" scheduling. It appears most teachers were assigned a "block" schedule.

²⁸ The Tentative Agreement of January 13, 1998.

²⁹ The School District was exploring the idea of going to a middle school concept during this time period and wanted also to see how this scheduling format worked in various middle schools.

Thereafter, the high school teachers voted to go to the aforementioned schedule before it was implemented for the 1999-2000 school year.³⁰ According to the testimony of Bober, it was his understanding that the new schedule format would not be implemented if the teachers rejected it. Bober further testified that after one year, teachers were suppose to sit down with the School District Administration and evaluate the new schedule format; and have another vote to determine whether to continue this program, however, this never occurred. According to the testimony of Superintendent Lang, the change in schedule was not contingent upon the teacher's vote; rather, it was to ascertain the teachers' feelings.

As stated earlier herein, the junior high school students also went to a six-class period out of an eight period day beginning in the 1999-2000 school year. As at the high school, the professional services or additional teaching assignment (ATA) and study hall were eliminated. The junior high school teachers' schedule varied, however, from the high school teachers' schedule. The difference in the junior high teachers' schedule was that the junior high teachers had a 20-minute homeroom or advisor/advisee period³¹, and their other class periods were longer in length. The junior high teachers had student contact time for five 49-minute class periods plus one homeroom period of 20 minutes for a total student contact time of 265 minutes.³²

³⁰ By a 60% to 40% margin according to high school teacher Phillip Bober and 70% to 30% according to Superintendent Lang. Bober is also a Union official, having served as Local President for 12 years. He currently is the Local's Secretary and Chief Negotiator.

³¹ Hereinafter homeroom.

³² This did not include "prep time" or lunch period.

In August 2004, the School District implemented the same schedule format at the junior high school that had been previously implemented at the high school in 1999. After learning of this pending implementation, Union Staff Representative James Poole sent Superintendent Lang a letter dated Wednesday August 18, 2004 wherein he informed Lang that,³³

"As of Monday of this week I became aware that the District is planning to go to an eight (8) period day for the coming school year. As you know, the contract specifically states that the teachers will have a five (5) period day with not more than 275 minutes of contact. I know that you have in prior years had a block schedule. Whatever agreement you had with the teachers would not have allowed you any other type of schedule other than the block schedule.

Please furnish to me any documentation that you might have giving you the authority to alter the contract. If you don't have any such documentation, then the eight (8) period day would be a violation of the contract and, as such, a grievable event. If this is true, we will go forward with a grievance. I appreciate any assistance you can give me in clearing this up."

Lang responded by letter dated August 24, 2004.³⁴ In his letter Lang stated,

"While you may have recently been made aware of the district's move at the junior high level to an eight period day, the Eveleth-Gilbert Exclusive Representative, and individual teachers were officially made aware of the change quite some time ago. Without going too far back into junior high records, I have enclosed junior high schedules from 11-4-02 and 8-30-03 indicating an eight period day at the junior high.

Jim, you reference a five (5) period secondary contact day but failed to continue with the remainder of the subdivision that states, "Beginning June 30, 1999, the secondary pupil-teaching contact time shall normally be an average of 275 minutes per day." This particular subdivision address the district and exclusive representative negotiated transition from a seven (7) period secondary day in which secondary contact time was defined in terms of periods, of undefined length, to contact time defined in terms of average minutes per day. Negotiations minutes and end of the year wrap-up clearly define what was discussed as intent with

³³ Union Exhibit No. 3

³⁴ Union Exhibit No. 1

respect to a four (4), six (6), seven (7), or eight (8) period day."

As stated earlier herein, beginning in the 2004-2005 school year the junior high school teachers were assigned the exact same class schedule format as their high school counterparts. The junior high school teachers were not asked to vote on this new schedule before it was implemented. After the schedule was implemented, the junior high school teachers were responsible to teach six class periods and their student contact time went from 265 to 270 minutes. The homeroom class period was also eliminated. This schedule remained in effect until the 2006 school year when it reverted back to the pre-1999 schedule at both the junior high and high schools.

As stated earlier, prior to 2004 the junior high school teachers were assigned to teach five class periods of 45 minutes and a homeroom class period of 20 minutes for a total student contact time of 265 minutes. There is contradictory evidence on just exactly what the teachers did when they were assigned to the 20-minute homeroom class period beginning in 1999. According to the testimony of High School Principal Deborah Hilde who had been the Junior High School Principal from 1998 through the Spring of 2004, a curriculum committee consisting of junior high school teachers and administrators developed a homeroom instructional curriculum, which was incorporated into a handbook. According to Hilde, there were approximately 20 students in each homeroom class, which is a slightly lower number of students than in a regular class. Hilde testified that the teacher in each homeroom class took daily attendance and was responsible for its students' curriculum. Hilde further testified that the curriculum was developed to help students

make the transition from elementary school to junior high school. Further, the curriculum was set down in a handbook that was given to each teacher. The curriculum consisted of a variety of activities "with the primary focus being improving study skills" such as, "how to take notes, what could you do to prepare for a test or what could you do when you are taking a test, the different kinds of tests and how could you read through a lesson and maybe identify what the key points in a lesson are". There were also "fun things" the students did such as making holiday decorations or making quilt squares in each homeroom that were latter combined into a wall hanging.

According to Hilde, the homeroom class period's purpose was to help the students to become "more successful in their academic performance" and make the students feel "more connected to the school." Hilde further testified that the "committee" was evaluating the homeroom period on a regular basis to see if it was serving its initial purpose of helping students become successful in their academic performance and helping them feel more connected to the school.

Hilde further testified that after a couple of years the curriculum was modified when the committee and junior high school teachers felt that there was a need for the students to be able to meet with other regular classroom teachers during the day. The curriculum was modified so that a student could sign out of their homeroom class period two days a week if they had a pass from another teacher.³⁵

The student could then go to that room and get tutoring from that teacher or they

³⁵ The two days a week time frame was later expanded to include more days per week.

could do make-up work since there were no study halls after the new schedule format was implemented.

Teacher David Kriska, who had been teaching at the junior high school³⁶ when the new schedule was implemented, testified that homeroom, which was right after lunch, "was pretty much chaos". He further described it as 20 minutes of roll call; and he did very little teaching, if any. According to Kriska, on a rare occasion he would answer a question, but he primarily read the newspaper and graded papers or impute grades into the computer involving his other classes. He did acknowledge that one time he did teach bus safety, which was required for all students. He also acknowledged that a committee of teachers had met and decided the curriculum to be used in the homeroom class, but did not remember receiving a curriculum handbook.

Junior high industrial arts teacher Steve Clouse testified that he had approximately 20 students in his homeroom. Since it was a "shop" setting, he did not have students sitting at a desk; rather, they sat wherever they could find a place. According to Clouse, all he did was take roll, read the newspaper and occasionally gave a student a pass to the media center. The only activities he supervised were the making of decorations or doing other things such as he would do with his Cub Scout kids. He was aware that a curriculum was developed for the homeroom and was given a copy; however, after one year, it was thrown away.

Both Kriska and Clouse testified that when the sixth class period was assigned to them, unlike the homeroom class assignment, it involved traditional teaching

³⁶ Prior to this he was teaching in the high school and was a "voter" on the new schedule.

functions.³⁷ It also involved more students with more classes and additional prep time on the part of the teachers. According to both teachers, all this extra work had an adverse psychological affect on them.

The evidence also established that junior high school teachers were paid additional compensation pursuant to Subsection 6 for an extra teaching assignment in excess of their five regular and the homeroom class periods prior to the 2004 school year. High school teachers received this same extra compensation prior to the 1999 school year, however, under the new schedule, they did not receive extra compensation unless the teaching assignment was in excess of the standard six classes. Superintendent Lang, in his unrefuted testimony, stated that additional compensation pursuant to Subsection 6 only arises after an extra teaching assignment resulted in him/her teaching in excess of 275 minutes per day for a semester or school year period.

POSITION OF THE UNION

Arbitral Issues

The Union disagrees with the School District's position that the grievance was not timely filed; and, therefore, it is not arbitrable. The grievance on its face was filed within the 21-day time limit established in Article XI Section 4 of the Agreement. In August 2004, the School District implemented the same schedule format at the junior high school that had been implemented at the high school in 1999. Union Staff Representative James Poole sent Superintendent Lang a letter dated Wednesday August 18, 2004 wherein he informed Lang that, "*As of Monday of this*

³⁷ Classroom instruction, assignments, tests, grading, etc.

*week, I became aware that the district is planning to go to an eight (8) period day for the coming school year".*³⁸ The grievance was thereafter filed on September 1, 2004, 16 days after notice and well within the 21-day time limitation.

In fact, the School District concedes to this, the Union argues. The School District, however, is claiming that a grievance should have been filed within the 21-day time limit from the date in 1999 when the six-class periods out of an eight period student day was implemented. The Union disagrees since the violation of Subsection 2 occurred when junior high school teachers were assigned a sixth classroom teaching assignment for the 2004 school year.

The Union also argues that the grievance is arbitrable because under Article IX Section 2 Subsection 5, a grievance "*means* a dispute regarding application or interpretation of any terms of a contract required under Minnesota Statutes, Section 179A Subd.1." The School District contends that the second sentence of Subsection 2 allows it to move to a six-class teaching assignment for the junior high school teachers as it did for the high school teachers, which renders the first sentence inoperative. The Union disputes this assertion and contends that the second sentence of Subsection 2 only applies to the high school teachers while the first sentence applies to junior high school teachers. Each party has different interpretations of Subsection 2; therefore, a contract interpretation issue is present that only an arbitrator is free to resolve.

The Union agrees that the School District would have the exclusive inherent managerial right to determine the number of class periods and the number of

³⁸ Union Exhibit No. 3

classes a teacher is required to teach if this were the only relevant contractual language. The School District, however, in agreeing to the language in Subsection 2 ceded this inherent managerial right in this area.

Substantive Merits Issue

The Union's position on the substantive merits of the grievance is that the School District violated Subsection 2 when it established a sixth class period for junior high school teachers since the language in the first sentence of Subsection 2 clearly established a five-class period schedule. The Union argues that it is immaterial that the parties may have negotiated a "Tentative Agreement" covering class periods and the number of classes that teachers may be assigned to teach, since the contractual language never reflected this agreement.³⁹ Moreover, the Agreement contains a negotiated "effects" provision. Article XVI Section 2 states, "*The provisions herein relating to terms and conditions of employment supersede any and all prior agreements, resolutions, practices, school district policies, rules, or regulations concerning terms and conditions of employment inconsistent with these provisions*". Therefore, the School District's notes and "Tentative Agreement" were both eliminated when the 1997-1999 Agreement was ratified. While notes and other documents can be used to interpret contract language when there is no issue as to whether the language exists, they cannot be used to prove that existent ratified language must be removed.

It is also immaterial that the high school teachers were assigned a new schedule format including teaching a sixth class period beginning in 1999. The new schedule

³⁹ The Union questions whether there ever was a Tentative Agreement, but presented no witnesses to support its contention

format only applied to the high school teachers. The high school teachers agreed to this change and actually voted on it. The junior high school teachers were neither affected nor did they participate in the "vote". When the junior high school teachers were assigned a sixth class period in September 2004, it violated the express language of Subsection 2 of the Agreement.

The Union further argues that the School District's position that the first sentence in Subsection 2 was eliminated when the second sentence was added also has no merit. The Union states the relevant Subsection 2 language has remained unchanged for three consecutive contract periods after its initial adoption. In view of this, all existing language must be given effect. The Union argues the language in Subsection 2 can only be interpreted to mean that both sentences apply; however, each sentence operates independently. Under the School District's interpretation, only the second sentence is effective. This makes no sense. If it had no effect, why did it continue to be included in Subsection 2 for the next three contract-periods? Moreover, the School District never proposed nor did the Union ever agree to remove this alleged inoperative sentence.

The School District's contention that the first sentence in Subsection 2 was eliminated because of the parties' past practice also has no merit. The School District contends that when it assigned teachers to a six out of eight or a "block" teaching schedule beginning in 1999 through 2005, this action constituted past practice; and this practice is controlling because the teachers did not grieve this action. The Union disputes this argument stating that if there was a past practice, it favors the Union. The evidence shows that junior high school teachers had a past

practice of teaching five classes and had some other supervisory duties prior to 2004. In fact, the junior high school teachers had the same five class period teaching schedule from 1985 until the School District changed it for the 2004 school year. When the School District increased the junior high school teachers' classroom teaching assignments, it violated this past practice as well as the Agreement.

The School District also contends that the parties erred in not removing the first sentence of Subsection 2, the same error it made when other outdated language that had no current effect was also not removed. The Union argues that other alleged outdated language applies to obsolete language that can be given no effect because of outside factors, such as Statutes that no longer exist or a board that was abolished or pay for a group of teachers that have subsequently retired. Because of these outside factors, the current Agreement language involving them can be given no effect. The language in the first sentence of Subsection 2, however, can be given effect; and goes beyond mere sloppiness.

The Union argues that while the School District contends that the junior high school teachers' schedule was changed to six out of eight periods in 1999 along with the teachers' schedule in the high school, the nature of the actions were not parallel. The teachers at the high school were given an additional classroom teaching assignment, which they agreed to. Those teachers taught their regular classroom subject matter in this additional class. They gave tests, homework and functioned as teachers during their added sixth period. By contrast, the junior high school teachers from 1999 to 2004 did nothing in their own subject matter for the 20-minute homeroom class period. They did not give out grades or tests or homework. The

time of this class was 20 minutes compared to the 49-minute regular classroom period. The alleged time homeroom teaching time added to the junior high schools teachers' schedule in 1999 had been a part of the first sentence in Subsection 2 for the previous 14 years under several different names.

Finally, The Union disputes the School District's contention that they have the exclusive inherent managerial right to change the number of teacher class periods. If this were true, why would it have bothered to add the second sentence of Subsection 2 in the Agreement? The management rights provision in Article IV Section 4 of the Agreement make it clear that they only involve "*...management rights and management functions not expressly delegated in this Agreement are reserved to the school district*". Even if the number of classes a teacher teaches per day is a management right rather than a term and condition of employment, the School District's argument fails because this right has been expressly delegated in Subsection 2 of the Agreement. The Union further contends that the number of class periods per day is the equivalent of hours of work and thus part of the mandatory negotiable terms and conditions of employment.

Finally, the grievance states the remedy sought is to "*Return to a five (5) period 275 minute day or any other remedies deemed necessary by the arbitrator*".⁴⁰ The School District did return to a five period class schedule during the current 2005-2006 school year. Therefore, the junior high school teachers only taught the extra class period for one year. The Union argues that, since the School District did violate Subsection 2, it is seeking a remedy consisting of payment to the junior high

⁴⁰ Union Exhibit No. 5

school teachers for their teaching an extra class period that should have been compensated according to Subsection 6 [EXTRA TEACHING ASSIGNMENT]. The School District asserts that even if the grievance is sustained there is no extra or overload payment due because the student contact time did not exceed 275 hours. The Union argues that nothing in Subsection 6 restricts extra payment to only those situations in excess of 275 minutes of student contact time. In the past junior high school teachers received extra payment when they agreed to teach a sixth or extra class period.

POSITION OF THE EMPLOYER

Arbitral Issues

The School District's position on the two arbitrability issues is that the Union did not process its grievance in a timely manner pursuant to the negotiated grievance procedure. Article XI Section 4 requires that a grievance must be filed at STEP ONE, *"within 21 days after the employee, through the use of reasonable diligence, should have had knowledge of the event or act giving rise to the grievance"*. Further, Article XI Section 8 Subsection 3 states, *"Failure to raise a grievance within the time limits specified in Section 4, or to initiate action at the next step of the procedure in Sections 4, 5, 6 and 7 within the time limits in these parts shall result in forfeiture by the exclusive representative of the right to pursue the grievance"*.

The School Board argues that the Union failed to file the grievance within the 21-day limit. The grievance should have been filed in 1999 rather than in 2004 because it implemented a six out of eight classroom period for secondary teachers beginning in the 1999 school year. It was able to do so because Union representatives agreed

with this concept during bargaining for the 1997-1999 Agreement. This is reflected in Lang's negotiation notes and the Tentative Agreement the Union representatives agreed to in early January 1998. The Union failed to call any of the Union representatives involved during the 1997-1999 negotiations to rebut Lang's testimony; and, therefore, an adverse inference attaches.

Beginning in the Fall of 1999, high school teachers were assigned a six-class teaching periods consisting of six 45-minute or three 90-minute classes, out of an eight period day schedule that involved 270 student contact minutes. Concurrently, junior high teachers were assigned five 49-minute class period teaching assignments and an additional 20-minute homeroom class period that involved a total of 265 minutes of student contact time.

Contrary to the Union assertions, the homeroom class period was an instructional class period with student contact making it a sixth class period teaching assignment. There was specific curriculum developed for this period. Just because some teachers like Kriska and Clouse did not take their responsibilities seriously and provide educational guidance during the homeroom class period does not negate the fact that this was a scheduled classroom teaching assignment.

Based on the above, the Union should have grieved the six-class period teaching assignment in the Fall of 1999; and its failure to do so results in forfeiture. Consequently the Arbitrator has no jurisdiction to resolve the grievance in this matter.

Substantive Merits Issue

The School District's position is that it did not violate Subsection 2 when it implemented the same schedule format for junior high school teachers in 2004 that it had previously implemented for high school teachers in 1999. The School District argues that Union representatives agreed that it could assign secondary teachers to a sixth class period involving student contact out of an eight period day during negotiations for the 1997-1999 Agreement. Superintendent Lang's negotiation notes and the Tentative Agreement support this argument. No distinction was made between junior high or high school teachers during these negotiations. Section 2 does not differentiate between junior high and high school teachers; rather, there is only one classification, secondary teacher for teachers who teach at the junior high and high schools. The Agreement does, however make a distinction between secondary and elementary school teachers.

The School District also argues that when it negotiated the second sentence in Subsection 2, it effectively removed the requirement of the first sentence. The controlling criterion now was the number of student contact minutes. Further, it was this provision that allowed it to implement the new schedule format in 1999, the same format the Union agreed to during the 1997-1999 negotiations. When it was implemented all secondary teachers had a six-class period teaching assignment. The only difference was the high school had six 45-minute or three 90-minute class periods for a total student contact time of 270 minutes while the junior high school teachers had five 49-minute and one 20-minute class periods for a total student contact time of 265 minutes. A grievance was never filed over the addition of this

sixth class period. In view of the above, the School District argues that the language in Subsection 2 can only be interpreted to give meaning to its second sentence.

If there is any ambiguity as to which sentence is operative, the School District argues that past practice supports its argument. According to the School District, the first sentence of the language in Subsection 2 should have been removed in the 1999-2001 Agreement since it was no longer operative. The failure to remove this sentence in this and subsequent Agreements was an oversight. This is not the only outmoded, archaic or no longer applicable contract language that should have been removed. For instance, the past practice has been to give high school teachers 90 minutes of prep time and the junior high school teachers 98 minutes when the Agreement calls for 75 minutes. Lang also testified that there are a number of provisions in the Agreement where specific language is no longer in effect or are applicable, yet still remains.

The School District also argues that past practice supports its contract interpretation argument. The evidence clearly shows that junior high school teachers have had a six-class period teaching assignment since 1999 covering 265 student contact minutes. In the new schedule they also had six-class period teaching assignments which totaled 270 minutes. The history of bargaining also shows that the School District made numerous financial concessions to the Union during the 1997-1999 contract negotiations.

Finally, the School District argues that the grievance is moot because the School District returned to five-class period of 275-minute student contact day for the 2005 – 2006 school year. No back pay would be justified in any event because neither the

high school teachers nor the junior high school teachers received additional compensation when they taught the sixth class period. Superintendent Lang testified that teachers do not get paid for an additional teaching assignment unless the total student contact time exceeds 275 minutes per day for a minimum period of a semester; and the teachers' total student contact time in the new schedule format did not exceed 275 minutes. Further, the Union never requested back pay as a relief when it filed the grievance.

OPINION

Arbitral Issues

On November 8, 2005, Sixth Judicial Court Judge James B. Florey entered a Judgment granting the Union's motion to compel the School District to arbitrate the instant grievance. In doing so the Judge reserved the question of arbitrability of the grievance to the arbitrator. The School District raises two procedural arbitrability issues. Both involve the timeliness of the grievance.

The grievance states the following

Contract provision alleged violated: Page 11: Article VIII Working Conditions: Section 2: Subd.2: Secondary Teacher Contact Time. The normal teacher load will be five (5) classes per day plus professional services excluding study hall; 1.S.S. not to exceed an average of 275 minutes per day. Beginning June 30, 1999, the secondary pupil-teaching contact time shall normally be an average of 275 minutes per day.

The remedy sought in the grievance is as follows:

Redress Sought: Return to a five (5) period 275-minute day or any other remedies deemed necessary by the arbitrator.

The School District contends that in order to be timely, a grievance over this dispute should have been filed in the Fall of 1999 when the School District implemented a six-class period for all secondary teachers. The Union contends its grievance is timely because it was not until the Fall of 2004 that the School District implemented a six-class period for junior high school teachers and a grievance was filed within the time frames contained in Article XI.

I agree with the School District's position that the grievance was not timely filed. The evidence clearly established that the "professional services" or ATA teacher responsibilities were eliminated for the 1999-2000 school year. The evidence also clearly established that the School District went to a six-class period schedule involving student contact (teaching time)⁴¹ in the Fall of 1999 at both the junior high and high schools. The Union argues that the sixth class period at the junior high school involved non-instructional student contact outside the teacher's subject area while the sixth class period at the high school involved teachers instructing students in the same subject area as the rest of their teaching assignments. There is no question that the sixth class period differed at each school. While the sixth class period may have been different, contrary to the Union's assertion, both involved an instructional student contact or teaching time period.⁴² A curriculum was developed for this homeroom class period and a curriculum handbook was given to each

⁴¹ The parties define student contact time as "*teaching time*". See the Tentative Agreement language on page 11. The Tentative Agreement also describes student contact time as, "*classes (math, science, social, etc.) and not those contacts with students as listed in the ATA assignments*."

⁴² The student contact time did not include ATA or professional services as they were eliminated. While no grades or tests were given, teachers were responsible for a specific curriculum much the same as any regular subject matter such as math, science, social, etc.

teacher.⁴³ According to the unrefuted testimony of former Junior High School Principal Hilde, the curriculum contained teaching responsibilities that teachers were supposed to follow. Just because some teachers like Kriska and Clouse chose not to follow the developed curriculum during the homeroom class period, does not negate the fact that this was a scheduled classroom teaching assignment.

The School District presented unrefuted evidence through Lang's testimony, Lang's 1997-1999 negotiation notes and the Tentative Agreement document, that no distinction was made between the junior high school and the high school teachers during negotiations. Although the parties never incorporated the Tentative Agreement into the 1997-1999 Agreement, the literal language shows the intent of the parties to allow the School District to move to a six-class period schedule format for "secondary" teachers. This intent is further bourn out by the parties negotiating the second sentence in Subsection 2. According to the unrefuted testimony of Lang, the language in the second sentence enable it to move to a six-class period schedule without violating the Agreement, more specifically the first sentence of Subsection 2.

Further evidence that it was the intent of the parties to include teachers at both schools in the new six-class period schedule format is in the language of the Tentative Agreement. There is no language in the Tentative Agreement, or in the Agreement itself for that matter, that differentiates between teachers at the junior

⁴³ While the handbook was never introduced into evidence, both the School District and Union witnesses acknowledged its existence.

high and high schools.⁴⁴ In addition, the unrefuted testimony of Lang disclosed that the School District gave additional wage increases and other economic benefits as a quid pro quo for its ability to go to a six-class period schedule.

The unrefuted evidence of Lang as listed above clearly shows that the parties agreed to the School District moving to a six-class period schedule involving student contact time or teaching time at both the junior high and high schools. It is immaterial that the high school teachers voted to accept the new schedule format and the junior high school teachers did not. It is the Union not the teachers that is the bargaining unit representative; and the Union did agree to a six-class student contact period during the 1997-1999 contract negotiations. Thereafter, the School District did implement the six-class period schedule involving teaching responsibilities and student contact at both schools for the 1999-2000 school year, and remained in effect through the 2005-2006 school year. In view of the foregoing, I conclude that the grievance herein was not filed timely; and is, therefore, not arbitrable based upon the evidence and reasons stated herein.

Substantive Merits Issue

In view of the foregoing, there is no need to decide the substantive merits of the grievance.⁴⁵

⁴⁴ There is such a distinction made between elementary and secondary teachers as each has their own work schedule hours.

⁴⁵ All the evidence, however, supports the School District's position on the substantive merits of the grievance. In any event there would be no remedy even assuming arguendo that the Union's position is correct. The School District reverted back to the pre-1999 class schedule format for the 2005-2006 school year. No back pay would be involved for the 2004-2005 school year because uncontroverted evidence disclosed that teachers are only compensated for "overload pay", pursuant to Subsection 6, for those teaching minutes in excess of 275 minutes per day and the teaching minutes (270) did not exceed this threshold. Finally, it is illogical to award overload pay for five extra minutes of teaching, especially when the high school teachers did not get overload pay for the five years it taught a sixth class period.

AWARD

IT IS HEREBY ORDERED that the grievance in the above entitled matter be and is hereby dismissed in its entirety for the reasons set forth in this Decision.

Dated: March 28, 2006

In Eagan, Minnesota

Richard R. Anderson - Arbitrator